United States Department of Labor
Employees' Compensation Appeals Board

K.W., Appellant	)	
and	)	**Docket No. 20-1237**
	)	**Issued: September 24, 2021**
DEPARTMENT OF THE ARMY, MANEUVER SUPPORT CENTER OF EXCELLENCE, COMMAND ELEMENT, Fort Leonard Wood, MO, Employer	)	

Appearances:
Victor A. Walker, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 2, 2020 appellant, through her representative, filed a timely appeal from a December 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on December 13, 2018, as alleged.

FACTUAL HISTORY

On January 7, 2019 appellant, then a 58-year-old supervisory staff accountant, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2018 she sustained a broken tibia and fibula when she fell on roller skates during an office holiday party. On the reverse side of the claim form, the employing establishment asserted that appellant was not in the performance of duty when her injury occurred as she was participating in an annual office holiday party at the time of her injury.

In a January 14, 2019 witness statement, D.S., appellant's coworker, indicated that he observed appellant attempting to hula hoop on roller skates at the December 13, 2018 Christmas party. When appellant attempted to turn to the left, her leg turned, but her skate did not and she was injured. Her coworkers immediately called an ambulance and notified the director.

In a witness statement of even date, K.S., appellant's coworker, stated that she saw appellant playing with a hula hoop while in a skating rink. As appellant was bending over to pick up the hula hoop, she lost her footing and fell. Her left foot got caught behind her right leg and she fell on it. K.S. explained that as she pulled her left leg from under her right, it was apparent that it was broken. She then called 9-1-1 and noted that appellant stayed on the ground until the emergency medical technicians (EMTs) arrived.

In a January 17, 2019 letter, the employing establishment controverted appellant's claim, contending that she was participating in an annual office holiday party and that participation was not required or prescribed as a part of her training or assigned duties. It also noted that her supervisor informed her that participation was voluntary.

In a January 21, 2019 medical note, Kathy Beckner, a physician assistant, referred appellant to physical therapy for a closed fracture of the right tibia and fibula and suggested work restrictions of no weight bearing on her left leg.

In a January 24, 2019 attending physician's report (Form CA-20), Dr. Curtis Mather, a Board-certified orthopedic surgeon, noted that appellant was injured on December 13, 2018 when she fell while roller skating. He diagnosed a displaced distal metaphyseal diaphyseal junction fracture of the tibia/fibula and checked a box marked "No" to indicate his opinion that her condition was not caused or aggravated by her employment.

OWCP received a position description of appellant's duties as a supervisory staff accountant.

In a development letter dated February 19, 2019, OWCP informed appellant of the factual and medical deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion to provide further details regarding the circumstances of her claimed injury. In a separate development letter of even date, OWCP

requested that the employing establishment provide responses from a knowledgeable supervisor regarding a series of questions regarding the recreational activity reported by appellant to assist it in determining whether she was in the performance of duty when injured. It afforded both parties 30 days to respond.

In a December 13, 2018 medical report, Dr. Trevor Lynn Bond, an osteopath Board-certified in family medicine, evaluated appellant for left lower leg/ankle pain after she fell on roller skates during a holiday party. He reviewed an x-ray of her left leg of even date and diagnosed a comminuted displaced angulated fracture of the lower tibia and the lower fibular diaphysis.

In progress notes dated December 17 and 20, 2018, Dr. Mather diagnosed a closed fracture of the left tibia and fibula and scheduled appellant to undergo surgery to treat her condition. A December 21, 2018 operative report revealed that Dr. Mather performed a tibial/fibula open reduction internal fixation procedure to treat appellant's closed fracture of the shaft of the left tibia and fibula.

Ms. Beckner advised, in a February 21, 2019 medical note, that appellant remain off work until March 7, 2019.

In a March 4, 2019 response to OWCP's development questionnaire, T.J., the deputy director for the employing establishment, asserted that appellant was not required to participate in the holiday party. He indicated that there was no persuasion to encourage employee participation. T.J. contended that the employing establishment received no benefit from employee participation. He explained that the incident occurred during regular work hours but did not occur on the employing establishment's premises. T.J. also asserted that the activity was supported by the private venue that hosted the party and that the employing establishment did not provide leadership, equipment or the facilities.

In a March 7, 2019 diagnostic report, Dr. Mather interpreted an x-ray of appellant's left leg that revealed good fixation of the fracture in her leg. In a medical note of even date, Ms. Beckner advised that appellant remain out of work through March 25, 2019.

In a March 13, 2019 letter, Dr. Mather recounted the history of his treatment of appellant's injury and diagnosed a displaced distal metaphyseal diaphyseal junction fracture of the tibia/fibula. He performed an open reduction with internal fixation procedure to treat her injury.

Appellant, in a March 18, 2019 response to OWCP's development questionnaire, stated that, while she was not required to attend the holiday party, the employing establishment had distributed fliers and e-mail notifications to inform employees of the date, time, and location of the event. She noted that all employees who chose to attend the holiday party were paid for that day and cited Chapter 2.804.8 of the Federal (FECA) Procedural Manual,[3] reasoning that she was in the performance of duty because she was paid while attending the holiday party. Appellant stated that it was her understanding that supervisors and managers encouraged more than just first line employees to attend the event. She explained that her injury occurred during work hours, but that it did not occur on the employing establishment's premises. Appellant further noted that the

[3] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.8 (August 1992).

employing establishment had put together a committee to plan the holiday party and that the committee had given several options for the event that employees were allowed to vote on.

In a March 20, 2019 medical note, Ms. Beckner advised that appellant remain off work until April 3, 2019.

By decision dated March 28, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that an injury occurred in the performance of duty as alleged.

OWCP continued to receive evidence. In diagnostic reports dated December 22, 2018 and April 4, 2019, Dr. George Runyon, a Board-certified radiologist, and Dr. Mather interpreted x-rays of appellant's left tibia and fibula.

On August 27, 2019 appellant, through her representative, requested reconsideration of OWCP's March 28, 2019 decision. In an attached memorandum, the representative asserted that appellant was in the performance of duty. He explained that the employing establishment's contention that it did not provide leadership, equipment, or facilities was incorrect as management initiated the planning of the holiday party and attached multiple e-mails demonstrating that T.J., the deputy director, was well aware of the leadership role as he was included in multiple e-mails with the planning committee. He stated that S.J., a director, gave instruction to assemble a planning committee for the event and that this act alone demonstrated that the employing establishment provided leadership. Appellant's representative reasoned that T.J.'s response to the planning e-mails was clear evidence of leadership as he suggested what the committee should do in order to determine which party plan to follow and included inclusionary language such as "sounds like it will be fun whatever we choose to do." He asserted that by having the directors involved, the employees were given a sense that it was required for them to attend the holiday party. "The venue provide no leadership for the party as they only provided the space and the food that the employee's paid for." The representative concluded by noting that employees who attended the event were still in pay status and that it was the employing establishment who had appellant complete the Form CA-1 when her injury occurred.

Appellant's representative attached e-mails dated November 14, 2018 between directors and the holiday party planning committee where S.J., another director, commented on the planning committee's initial plans and asked additional follow-up questions concerning the number of people who would attend and a poll to determine what type of event would be held.

In separate statements dated May 28, 2019, L.G. and C.G., appellant's coworkers, attested that they were paid by the employing establishment while participating in the December 13, 2018 holiday party.

By decision dated December 6, 2019, OWCP denied modification of its March 28, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[5] that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[8] The phrase "in the course of employment" is recognized as related to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."[9] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[10]

With regard to recreational or social activities, the Board has held such activities arise in the course of employment when: (1) they occur on the premises during a lunch or recreational period as a regular incident of the employment; (2) the employing establishment, by expressly or impliedly requiring participation or by making the activity part of the service of the employee, bring the activity within the orbit of employment; or (3) the employing establishment derives

[4] *Supra* note 2.

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *A.K.*, Docket No. 16-1133 (issued December 19, 2016); *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[9] *See A.S.*, Docket No. 18-1381 (issued April 8, 2019); *D.L.*, 58 ECAB 667 (2007); *Mary Keszler*, 38 ECAB 735, 739 (1987).

[10] *M.T.*, Docket No. 16-0927 (issued February 13, 2017); *Vitaliy Y. Matviiv*, 57 ECAB 193 (2005); *Eugene G. Chin*, 39 ECAB 598 (1988).

substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale, which is common to all kinds of recreation and social life.[11]

OWCP's procedures also provide that the employee is considered to be in the performance of duty while engaged in formal recreation and either the employee is paid for participating or the recreational activity is required and prescribed as a part of the employee's training or assigned duties.[12] The claims examiner may approve injuries occurring under these circumstances if the file contains a statement from the official superior showing that: (1) at the time of the injury, the deceased or injured employee was engaged in a recreational activity organized and directed by the employing establishment and the employee was being paid for participating; or (2) the activity was required and prescribed as a part of the employee's training or assigned duties.[13]

ANALYSIS

The Board finds this case not in posture for decision.

Whether an injury occurs in the performance of duty is a preliminary issue to be addressed before the remaining merits of the claim are adjudicated.[14] On her Form CA-1 appellant claimed that she sustained a broken tibia and fibula in her left leg when she fell at an office holiday party on December 13, 2018 while in the performance of duty. On the reverse side of the claim form the employing establishment contended that she was not in the performance of duty when her injury occurred as she was participating in an annual office holiday party at the time of her injury.

In its February 19, 2019 development letter to the employing establishment, OWCP requested that a knowledgeable supervisor respond to a series of questions regarding the recreational activity reported by appellant. The employing establishment, however, responded only by providing a March 4, 2019 statement from T.J., who maintained that appellant was not required to participate in the office holiday party, that the employing establishment did not persuade or encourage employee participation, and that the employing establishment received no benefit from employee participation. He also claimed that the activity was supported by the private venue that hosted the party and that the employing establishment did not provide leadership, equipment or the facilities. OWCP's procedures provide that, where injuries are sustained while the employee is engaged in a recreational activity under other circumstances, it is necessary to ascertain what benefit, if any, the employer derived from the employee's participation in the activity, the extent to which the employer sponsored or directed the activity, and whether the employee's participation was mandatory or optional.[15] OWCP's procedures further provide that

[11] *See Lawrence J. Kolodzi*, 44 ECAB 818, 822 (1993).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4a (June 2011).

[13] *Id*.

[14] *T.H.*, Docket No. 17-0747 (issued May 14, 2018); *P.L.*, Docket No. 16-0631 (issued August 9, 2016); *see also M.D.*, Docket No. 17-0086 (issued August 3, 2017).

[15] *Supra* note 12 at Part 2 -- Claims, *Performance of Duty*, Chapter 2.808.8 (August 1992). *See also Donald C. Huebler*, 28 ECAB 17 (1976); *Stephen H. Greenleigh*, 23 ECAB 53 (1971).

the employee is considered to be in the performance of duty while engaged in formal recreation and either the employee is paid for participating or the recreational activity is required and prescribed as a part of the employee's training or assigned duties.[16] As OWCP failed to request all the information necessary to determine whether appellant was in the performance of duty, the case must be remanded for further development of the claim.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[17]

Accordingly, the Board will remand the case for OWCP for further development regarding whether appellant was in the performance of duty when injured on December 13, 2018. On remand, OWCP shall obtain additional information from the employing establishment regarding whether the holiday party was organized, directed, or paid for by the employing establishment, as well as information regarding the establishment and composition of the party's planning committee. Additionally, it shall obtain all relevant information from the employing establishment regarding appellant's pay status on the date of injury, including copies of her pay stubs and time and attendance records. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds this case not in posture for decision.

[16] *Supra* note 12.

[17] *A.M.*, Docket No. 18-0630 (issued December 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 24, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board